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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 592.

FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal From the District Court of the United States for the Western District of Kentucky, Louisville Division.

BRIEF ON BEHALF OF THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLEES.

W. L. GRUBBS,
E. A. SMITH,
Y. D. LOTT,
H. L. WALKER,
L. L. OLIVER,
F. W. GWATHMEY,
CHARLES CLARK,

Attorneys for Alabama Great Southern Railroad Company, et al., Appellees.

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OPINIONS BELOW.

The opinion of the specially constituted three-judge District Court of the United States for the Western District of Kentucky, Louisville Division, entitled *State of Ala-*

bama v. *United States*, Nos. 706-708, appears in the Record at page 1345; its findings of fact and conclusions of law appear at pages 1341-1343; its decree thereupon entered at page 1362; and officially reported at 56 F. Supp. 478.[1]

The order of the Interstate Commerce Commission which gave rise to the suits in the District Court appears at pages 1-3 of the Record; the report of the Commission upon which said order was made appears in the Record at pages 4-39; and is officially reported at 258 I. C. C. 133, entitled Docket No. 28963, *Alabama Intrastate Fares*.[2] These two papers appear as Exhibits A and B to the Tennessee complaint, No. 707.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 47 (a) and 345, wherein a direct appeal to this Court is authorized from a final decree of a District Court of the United States, made pursuant to the provisions of Title 28, United States Code, Sections 41 (28), 43-48, and Title 49, United States Code, Section 17 (19) in a case brought to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission, other than for the payment of money.

The rail lines (appellees here), upon whose petitions the Interstate Commerce Commission instituted the three proceedings giving rise to the order here immediately involved,

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[1] The opinion below is entitled State of Alabama v. United States, but it embraces the suit of that State and its Public Service Commission, Docket No. 706, the suit of the State of Tennessee and its Railroad and Public Utilities Commission, No. 707, and the suit of the Commonwealth of Kentucky and its Railroad Commission, No. 708, consolidated.

[2] The report and subsequent order of the Interstate Commerce Commission embraces four separate proceedings, three of them involving passenger fares within the States of Alabama, Tennessee, and Kentucky, and a fourth involving passenger fares within the State of North Carolina. While there were four separate proceedings, the I. C. C.'s decision was embraced in one report and order covering all four.

duly intervened as parties defendant in the District Court in the three suits therein instituted by said states and their railroad regulatory commissions under authority of Title 28, U. S. C., Section 45a (R. 431, 542, 1136).

The final decree of the District Court was entered on the third day of August, 1944 (R. 1362). The Price Administrator's petition for appeal was presented and allowed on the first day of September, 1944 (R. 1376, 1379). Probable jurisdiction was noted by this Court on the thirteenth day of November, 1944 (R. 1393).

THE STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, Part I, as amended; particularly its provisions relating to prescription of reasonable rates (Title 49, U. S. C., Section 15 (1)) for the transportation of persons in the light of what is known as the "rule of rate making" (Title 49, U. S. C., Section 15a (2), 54 Stat. 912), and the "national transportation policy" (Title 49, U. S. C., notes preceding Section 1, 54 Stat. 899); and more especially involved is the application of the Federal statute (Title 49, U. S. C., Section 13 (3) (4)) to remove any unreasonable preference or prejudice as between persons in intrastate and interstate commerce, or any unreasonable discrimination against interstate commerce. These sections of the Act are set out in Appendix A to our brief in No. 560, the appeal of the North Carolina interests.

Section 13(4) immediately involved is here quoted:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or

charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Also involved in the Price Administrator's appeal are: Section 302(c) of The Emergency Price Control Act of 1942 (56 Stat. 36; 50 U. S. C., Section 942(c)) and the amendment thereto of October 2, 1942, familiarly known as The Stabilization Act (56 Stat. 765; 50 U. S. C., Section 961). The pertinent parts of these statutes are set out in the argument where we quote from the opinion of Judge Miller speaking for the District Court.

STATEMENT OF THE CASE.

This is a companion appeal to that of the States of Alabama, Tennessee, and Kentucky, No. 574, October Term, 1944, and now pending. It brings up for review the decree (R. 1362) of the statutory three-judge District Court wherein the order (R. 1-3, 4-39) of the I. C. C. was upheld.

The intrastate one-way civilian[3] coach fares within the States of Alabama, Kentucky, and Tennessee were published and maintained at the rate of 1.65 cents per mile and such round-trip fares within such states were on a somewhat lower level.

Rail fares good for round-trip transportation in sleeping cars and chair cars within the States of Alabama and Tennessee were on a lower level than the 3.3-cent-per-mile rate applicable to the one-way fares in sleeping and chair cars.

[3] Confined to "civilian," because the lower charges paid by United States Government for troop movements and the 1.25-cent fares maintained for service men and women traveling on furlough or within thirty days after their discharge from the service are not here involved.

Certain railroads operating within each of these three states filed their appropriate tariffs with the railroad regulatory authorities therein whereby said roads sought to increase their one-way coach fares from 1.65 cents to 2.2 cents per mile and their round-trip coach fares to 1.98 cents per mile, also increasing the round-trip fares good for transportation in sleeping cars and chair cars to 2.75 cents per mile.

The Railroad Commission of Kentucky authorized the 2.75-cent rate for sleeping and chair car round-trip transportation. Otherwise the state authorities suspended said tariffs in each state and after hearing thereon denied the increases sought. (R. 49-Tennessee, R. 855-Alabama, R. 1062-Kentucky.)

Thereupon, the rail lines, which had been denied the increases sought, filed their petitions with the I. C. C. under Section 13 (3) and (4) of the Interstate Commerce Act. Three separate petitions were filed. They were docketed *Alabama Intrastate Fares* No. 28963, *Kentucky Intrastate Fares* No. 29000, and *Tennessee Intrastate Fares* No. 29037.

Separate hearings were had in each of said proceedings, briefs were filed therein, and oral argument had before the I. C. C., the full bench sitting. Identical steps had been taken in respect of the intrastate civilian coach fares within the State of North Carolina. Upon refusal to sanction the increases to 2.2 cents one way and 1.98 cents round trip, a thirteenth-section petition was filed and docketed No. 29036. The North Carolina case was heard before the I. C. C. on oral argument along with the three proceedings here immediately involved.

Following said oral argument, one report was issued covering all four proceedings and entitled *Alabama Intrastate Fares*, dated March 25, 1944, and reported 258 I. C. C. 133-155 (R. 4-47).

A formal order was not entered at the time said report was issued, the I. C. C. saying that in accordance with its practice it left to the respective states the matter of adjust-

ing the intrastate fares to conform to its findings and upon failure so to do consideration would be given to the entry of an appropriate order (p. 155, R. 39). Such readjustment not having been authorized by these states, the I. C. C. entered its order on May 8, 1944 (corrected), wherein it required the rail lines, which it had made respondents in the four thirteenth-section proceedings, to increase their intrastate fares to the level of the interstate fares for such services, which the I. C. C. had prescribed for general application interstate throughout the United States and which had been sanctioned and put into effect in forty-four of the states for intrastate application (R. 1-3).

The state authorities of Alabama, Kentucky, and Tennessee filed their petitions (R. 1, 506, 1047) in the District Court of the United States for the Western District of Kentucky, Louisville Division, wherein they respectively sought to enjoin, set aside, annul, and suspend the order of the I. C. C., dated May 8, 1944 (R. 1-3). A three-judge District Court was convened, pursuant to the provisions of the statute, at Louisville, Ky., on the twentieth day of June, 1944 (R. 410). On call of the three cases, they were tried, argued, considered, and decided as a consolidated case, and upon findings of fact and conclusions of law, together with the Court's opinion, a decree was entered on the third day of August, 1944, denying the relief the complainants sought and dismissing their three complaints, thus upholding the order of the I. C. C. assailed by the three states and their regulatory commissions (R. 1362).

The three states having made their direct appeal to this Court, the same was docketed No. 574, October Term, 1944.

The thirteenth-section proceeding involving the North Carolina fares, heretofore referred to, resulted in a similar effort on the part of the North Carolina interests to enjoin and set aside the order of the I. C. C. A three-judge District Court having dismissed its complaint and upheld the order of the I. C. C. (56 F. Supp. 606), an appeal was taken which has been docketed in this Court as No. 560,

October Term, 1944. The Price Administrator took his separate appeal in the North Carolina case, docketed here No. 561, October Term, 1944.

By appropriate order, it has been directed that the appeals in No. 574 and No. 592 be heard upon oral argument immediately following the oral argument in No. 560 and No. 561 (R. 1393).

ARGUMENT.

The Price Administrator's appeal at bar is a companion appeal to that taken by the States of Alabama, Tennessee, and Kentucky, No. 574. The Price Administrator also took his direct appeal in the North Carolina case which has been docketed No. 561. That appeal, of course, was a companion appeal to that of the North Carolina interests which was docketed No. 560. We have filed separate briefs in all three of those cases. It seems hardly necessary to file a separate one here in No. 592 feeling as we do that we have completely answered the Price Administrator's contentions in our other briefs referred to, and particularly the one filed in No. 561. We are strengthened in that view because the Price Administrator's assignment of error in the case at bar (R. 1377-1378) appears to be the same as his assignment of error in No. 561, and, further, the Price Administrator has filed one brief to cover his appeals in No. 561 and No. 592. However, out of abundant caution, we are filing this short brief in No. 592. By way of argument, we can not do better than borrow the language of Judge Miller, speaking for the three-judge District Court. We thus take the liberty of submitting below exactly what he had to say in disposing of the Price Administrator's contentions before the District Court (R. 1358-1361):

> The Commission found as finding No. 6 that the maintenance of the existing lower intrastate coach fares in Alabama, Tennessee, and Kentucky causes undue, unreasonable and unjust discrimination against interstate commerce, which should be removed by in-

creasing intrastate fares in respective states to the level of the corresponding interstate fare to, from and through such states. The evidence showed that the disparity in rates causes the railroads' revenues to be substantially less than they would be if the intrastate fares were increased to the interstate fare level, and that this disparity is such that passengers destined to points outside the respective states were encouraged to purchase intrastate tickets to points near the state line and then either buy tickets or pay cash for the remainder of the journey, thus using the lower intrastate fare to defeat the higher interstate fare. The two classes of traffic are inextricably intermingled; the same railways and the same cars carry both passengers; the same men operate the train in its intrastate journey and in its interstate journey. Under such conditions the effect of maintaining a materially lower rate intrastate than the reasonable interstate rate necessarily results in intrastate traffic failing to pay a fair proportionate share of the cost, maintenance and operation and is discriminatory against interstate traffic. Wisconsin Railway Commission v. C. B. & Q. R. R. Co. 257 U. S. 563; New York v. United States 257 U. S. 591; United States v. Louisiana 290 U. S. 70; Florida v. United States 292 U. S. 1; Illinois Commerce Commission v. United States 292 U. S. 474. The existence of such discrimination against interstate commerce, regardless of the non-existence of any advantage as between persons or localities is sufficient justification for the Commission to end the disparity by ordering it removed. (R. 1359.)

Petitioners contend that existing rates yield sufficient revenue to constitute a reasonable return to the carriers, that the additional revenue from raising the intrastate rates is not necessary, and that the resulting total revenue will be materially more than the carriers are legally entitled to receive. That may be the result,

at least temporarily. But the proposed increased rates are not based on the need for additional revenue. The proposed increase is for the purpose of removing an unjust discrimination against interstate commerce which the Commission is empowered to do regardless of resulting increased revenues or the non-existence of any need for the same. It may be that later, after the increase has had time to show its effect, a downward revision of both interstate and intrastate rates will be in order to meet this objection. On the other hand, present large revenues flow from abnormal traffic conditions, clearly only temporary in their nature. With the return to normal conditions, including the resumption of strong competition from trucks and busses, the combined returns may not be unreasonable. Rate making is not confined to a consideration of results from a single calendar year or from a temporary abnormal condition. The Supreme Court recently held that the present bulge of war earnings is unreliable for use as a standard. Group of Institutional Investors v. Chicago, Milwaukee, St. P. and P. R. Co. 318 U. S. 523, 543. It is approved administrative practice to consider conditions over a reasonable period of years, to strike an average, in determining a basis for rate making. St. Joseph Stock Yards Co. v. United States 298 U. S. 38, 46-47; South and North Alabama R. Co. v. Railroad Commission 210 Fed. 465, 480. (R. 1360.)

The Economic Stabilization Director and the Price Administrator contend that in addition to the Commission's failure properly to interpret and apply its constitutional and statutory authority to protect interstate commerce from undue burdens from intrastate commerce the Commission has failed to accommodate the exercise of its powers to the congressional policies embodied in the Emergency Price Control Act of 1942 and the Stabilization Act of October 2, 1942, and that

by reason thereof its order of May 8, 1944 is null and void. This brings into consideration the statutory authority under which these interveners attack the order in question and their standing in the proceedings. Section 302(c) of the Emergency Price Control Act of 1942 (50 USCA Section 942(c)) provides:

> "Nothing in this Act shall be construed to authorize the regulation of * * * rates charged by any common carrier or other public utility."

Compare Davies Warehouse Co. v. Bowles 321 U. S. 144. The Emergency Price Control Act was supplemented by the Act of October 2, 1942 which provides:

> "'That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives 30 days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or Municipal authority having jurisdiction to consider such increase." 50 USCA Section 961.

While this language confers upon the executive the right to notice by the utility and requires the utility's consent that the executive be heard by the regulatory body, yet it has been held that in the absence of a clear legislative mandate to the contrary such interveners do not possess any greater rights than other interveners, and that Congress did not intend to limit in any way the existing power of the Interstate Commerce Commission over rate increases, or to give the Price Administrator any standing to make mandatory demands upon it or to take from it any part of its existing discretion. Vinson v. Washington Gas Company 321 U. S. 489; Interstate Commerce Commission, et al. v. The City of Jersey City et al., U. S. Supreme Court decided May 29, 1944. In the Jersey City case above referred to the Court specifically stated that the

opinion of the Price Administrator is not mandatory on the Commission; that the weight to be given to the Price Administrator's contentions called for an exercise of judgment by the Commission and was for the Commission, not for the Court, to determine; that the Interstate Commerce Commission has the responsibility for maintaining an adequate system of wartime transportation, which is a very intricate problem involving many variable factors and calling for informed, expert and unbiased judgment; and that the decision of such a matter by the Commission is clearly not reviewable by the Court because it thinks differently of the weight which should be accorded by some factors in relation to others. In the hearings now under consideration, the Price Administrator was given the required notice and was afforded the opportunity of introducing evidence and of being heard. The report of the Commission refers to his evidence and to his contentions. He has accordingly had the hearing and consideration that the statute provides. He has no standing now in this Court to complain that because his views and contentions were not adopted by the Commission the Commission's order is void and of no effect. His intervention in the three cases presents no additional question to those already discussed. (R. 1361.)

In our opinion the corrected order of the Interstate Commerce Commission of May 8, 1944, herein complained of, was within the power of the Commission and properly applied the law to its findings of fact; that these findings of fact are supported by substantial evidence; and that the order is accordingly a valid one which this Court is not authorized to review any further than as hereinabove indicated. Accordingly, the injunction prayed for in each case is denied and the respective complaints will be dismissed. (R. 1361.)

CONCLUSION.

After this clear statement from the court below, no further argument is necessary. We do, however, make this observation. It is a matter of common knowledge that in World War I, the Federal government took over the railroads and paid their owners for them. Now, in World War II the situation is just the reverse for the owners of the railroads have been operating them and are continuing to operate them in support of our Nation's prosecution of this war instead of the Federal government paying the railroads. The railroads, under the working of the Federal tax laws, are making substantial payments into the Federal treasury which also is in furtherance of the war effort. Certainly no idea of inflation could possibly flow from the above stated very practical situation. The decree of the Court below should be affirmed.

Respectfully submitted,

W. L. GRUBBS,
E. A. SMITH,
Y. D. LOTT,
H. L. WALKER,
L. L. OLIVER,
F. W. GWATHMEY,
CHARLES CLARK,
Attorneys for Alabama Great Southern Railroad Company, et al., Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 574 and 592.—October Term, 1944.

The State of Alabama and Public Service Commission, the State of Tennessee and the Railroad and Public Utilities Commission of the State of Tennessee, Commonwealth of Kentucky and Railroad Commission of Kentucky, Appellants, 574 *vs.* The United States of America, Interstate Commerce Commission and William H. Davis, Economic Stabilization Director, by Chester Bowles, Price Administrator, et al.	On Appeals from the District Court of the United States for the Western District of Kentucky.
William H. Davis, Economic Stabilization Director, by Chester Bowles, Price Administrator, Appellant, 592 *vs.* The United States of America, Interstate Commerce Commission and the Alabama Great Southern Railroad Company, et al.	

[June 11, 1945.]

Mr. Justice Black delivered the opinion of the Court.

The States of Alabama, Tennessee, and Kentucky filed a bill in a federal district court seeking to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The Federal Economic Stabilization Director, acting through the Price Administrator, was granted the right to intervene. The Commission's order directed that intrastate railroad rates in Alabama, Kentucky, Tennessee and North Carolina, be raised to the level of interstate rates fixed by the Commission.[1] The district court

[1] 258 I. C. C. 133. The state 1.65 cents per mile passenger coach rate was directed to be raised to 2.2 cents per mile. Round trip coach rates were ordered proportionately raised. Sleeping and parlor car intrastate fares in some of the States were also directed to be increased.

declined to enjoin enforcement of the order, 56 Fed. Supp. 478, and the case is here on direct appeal under Section 210 of the Judicial Code.

The issues here are substantially the same as in Nos. 560 and 561, this day decided, which involved the same order of the Commission as it applied to rates in the State of North Carolina. The Commission relied basically on the 1936 rate order, to which we referred in our opinion in the *North Carolina* case. Here also the Commissions of the three states had held hearings and determined that the intrastate rates were adequate in every respect to give the particular railroads involved a sufficient income to compensate them fully for their services and to enable the railroads adequately and efficiently to operate in the State. There was evidence before each of the state Commissions, as there was before the Interstate Commerce Commission, that the railroads were enjoying an unprecedented prosperity and reaping a tremendous harvest of profits from their railroad operations in the state. There was evidence from which the Interstate Commerce Commission could have found that the intrastate passenger rates involved were sufficient to pay each railroad a substantial profit for each mile it carried an intrastate passenger. The findings here possess the same infirmities as those in the *North Carolina* case. It follows that our judgment must be the same.

Because the order of the Commission was not based on adequate findings supported by evidence, the District Court should have declined to enforce the Commission's order. The judgment of the district court is therefore

Reversed.

The CHIEF JUSTICE, Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice FRANKFURTER dissent for the reasons stated in the dissent to Nos. 560-61, decided today.